IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.936 OF 2005

Bhalchandra Mahadeo Ghanekar ...Appellant

vs.

Shrikrishana Mahadeo Ghanekar
(since deceased hence by trustees
of Shri Mahadev Shivram Ghanekar
Trust and others ...Respondents

WITH
SECOND APPEAL NO.933 OF 2005

Bhalchandra Mahadeo Ghanekar ...Appellant

vs.

Shrikrishana Mahadeo Ghanekar
(since deceased hence by trustees
of Shri Mahadev Shivram Ghanekar
Trust and others ...Respondents

WITH
SECOND APPEAL NO.934 OF 2005

Bhalchandra Mahadeo Ghanekar ...Appellant

vs.

Upendra Dattatraya Mokashi & Ors. ...Respondents

WITH
SECOND APPEAL NO.937 OF 2005

Bhalchandra Mahadeo Ghanekar ...Appellant

vs.

Shrikrishana Mahadeo Ghanekar
(since deceased hence by trustees
of Shri Mahadev Shivram Ghanekar
Trust and others ...Respondents

Mr.Anilkumar Patil for the Appellant

Mr.Dabke for the Respondents

CORAM: A.S.OKA, J.
DATE : FEBRUARY 27, 2008

ORAL JUDGMENT:

1. These Appeals can be conveniently disposed of by a common Judgment and Order. The Appeals arise out of four different suits. Kusumakar, Bhalchandra and Shrikrishna are the three real brothers. There father Mahadeo was the sole owner of the suit property known as ‘Ghanekar Niwas’, bearing City Survey No.6275 to 6278 at village Thakurli, Taluka Kalyan. The said Mahadeo executed a gift deed dated 26th April 1971 by which he gifted specific shares in the suit property to his three sons and kept some portion of the open site in the property common amongst the three sons. Later on, Shrikrishna created a trust in the name of his father Mahadeo. Shrikrishna treated the property gifted to him by his father as a trust property.

2. Brothers Kusumakar and Bhalchandra contended that the desire of the father was none of the brothers should transfer the gifted property to the strangers. They filed R.C.S.No.300 of 1987 claiming their preferential right to purchase to the share of Shrikrishna in the suit property. The suit was resisted by Shrikrishna and other trustees of the Trust created by him. R.C.S.No.408 of 1987 was filed by the said Shrikrishna and the trustees for permanent injunction against

Kusumakar and Bhalchandra. Kusumakar and Bhalchandra file one more suit bearing no.473 of 1987 for permanent injunction restraining the said Shrikrishna and the trustees of the trust from obstructing their possession over the suit property. Lastly, R.C.S.No.128 of 1989 was filed by the trustees of the said trust created in the name of Mahadeo against Kusumakar and Bhalchandra. Perpetual injunction was claimed restraining Kusumakar and Bhalchandra from contending that the creation of the trust was not binding on them. The aforesaid four suits were decided by the learned trial Judge by a common Judgment. The learned Judge negatived the case made out by the said Kusumakar and Bhalchandra that they along with their brother Shrikrishna had agreed to keep the suit property as a joint property. The trial court held that Kusumakar and Bhalchandra failed to prove that it was agreed by and between them and Shrikrishna that the gift deed dated 26th April 1971 was not to be acted upon. The trial court also negatived their case of existence of a preferential right to purchase Shrikrishna's share. The trial court held that the said Shrikrishna and Bhalchandra failed to prove that they were in possession of the property which was allotted to Shrikrishna. The trial court lastly held that the action of Shrikrishna of creating a trust of the property allotted to him by his father does not amount to transfer the property and consequently, the trial court held that the trustees of Mahadeo Shivram Ghanekar Trust were in lawful possession of Shrikrishna's share in the suit

property. Thus, the R.C.S.No.300 of 1987 and R.C.S.No.473 of 1987 were dismissed and R.C.S.No.408 of 1987 and R.C.S.No.128 of 1989 were decreed. The declaration granted by the trial court is that the property allotted to the share of Shrikrishna was the trust property and said Kusumakar and Bhalchandra were restrained from carrying on the construction on the said property. There were four Appeals preferred before the District court. The District Court confirmed the decrees passed by the trial court and dismissed the four Appeals. Accordingly, four Second Appeals have been preferred.

3. The submission of the learned Advocate for the Appellants was that there was a clear evidence on record to show that the three brothers agreed to keep the property of Ghanekar House as an undivided and joint property. He submitted that there was evidence on record to show that the gift deed was not to be acted upon and the property continued to be a joint property of the brothers. He submitted that Shrikrishna could not have created the trust of the share in the property given to him as a gift as the creation of trust amounts to transferring the said share which was agreed to be kept joint.

4. I have carefully considered the submissions. There does not seem to be any dispute between the parties that the larger property known as Ghanekar House is the self acquired as

property of Mahadeo and there was a registered gift deed executed by Mahadeo gifting three separate shares in the property to the three brothers. The said gift deed has been duly registered.

5. Reliance was placed on a particular clause by the Appellants which records the wishes of the said Mahadeo that his desire was to maintain the property in the family itself. The courts below have correctly interpreted the aforesaid clause by holding that the same only expresses the desire of the father and it is not a condition attached to the gift. It is very difficult to find fault with the said finding recorded by the courts below. The courts below have scanned the oral and documentary evidence on record. A finding is recorded that Kusumakar and Bhalchandra failed to prove that the property was agreed to be kept joint notwithstanding the execution of the registered gift deed by the father. The courts below have concurrently held that the said case made out of existence of an oral agreement and consequently the existence of the alleged preferential right to purchase the property has not been proved by the said Kusumakar and Bhalchandra.

6. Under the gift deed Shrikrishna became the owner of the share allotted to him. He created a trust on 13th August 1987 of the property allotted to his share. The trust was made in

the name of the deceased father. After consideration of section 5 and 6 of the Indian Trusts Act, 1882 the courts below and especially the Appellate Court held that if the author is the owner and a trustee himself, it is not necessary for him to convey the property to the trust. Therefore, a finding was recorded that the creation of the trust by Shrikrishna is not at all a transfer but the said Shrikrishna and other trustees are the custodians of the property. Therefore, it was held that the trustees of the trust were in lawful possession.

7. I find no reason to interfere with the concurrent findings of fact recorded by the courts below. No substantial question of law arises. Second Appeals are accordingly dismissed with no order as to costs.

JUDGE